

No. 14496

United States
Court of Appeals
for the Ninth Circuit

EDWIN B. SWOPE, Warden, U. S. Penitentiary,
Alcatraz, California,

Appellant,

vs.

SELVIE W. WELLS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

OCT 26 1954

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

LLOYD H. BURKE, ESQ.,

United States Attorney;

RICHARD H. FOSTER, ESQ.,

Asst. United States Attorney,

P. O. Building,

San Francisco, California,

Attys. for Respondent and Appellant.

MORRIS M. GRUPP, ESQ.,

Mills Building,

San Francisco, California,

Attorney for Petitioner and Appellee.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 33471

SELVIE W. WELLS,

Petitioner,

vs.

E. B. SWOPE, Warden,

Respondent.

PETITION FOR A WRIT OF
HABEAS CORPUS

April 7, 1954

The verified petition of Selvie W. Wells shows:

That your petitioner is unlawfully imprisoned and restrained of his liberty by E. B. Swope, Warden of U. S. penitentiary at Alcatraz, Calif., in the County of San Francisco, in the State of California; under color of authority of a judgment of conviction, sentence and a mittimus irregularly issued from and out of and under the hand and seal of the United States District Court for the Western District of Texas.

That the body of the petitioner, and the said E. B. Swope, are all and each of them within and subject to the jurisdiction of this, the above-entitled and named court; and that this, the said United States District Court for the Northern District of California and the Southern Division thereof do have jurisdiction of this habeas corpus proceedings, including the judicial power and authority to issue and to grant the writ prayed herein and to dis-

charge the petitioner from unlawful imprisonment, double jeopardy, and restraint of his liberty under the provisions of law, to wit: Title 28 U.S.C.A. Sections 451, 452, 453 on to 463; new law title 28 Sections 2241, 2243; and *Barrett vs. Hunter* "10 Cir." 180 F2D 510; *United States vs. Morgan*, 74 Supreme Court 247, at page 252, and *Booth vs. United States* "9 Cir." 209 F2D 183, at page 184, Chief Judge Denman, said relief under habeas corpus is limited to release from present detention.

That annexed hereto and made a part hereof as though fully copied herein are the following certified documents:

1. Indictment, judgment of conviction, and sentence styled United States of America, plaintiff, vs. Selvie Winfield Wells.

Grounds for Granting the Writ

Your petitioner has two sentences for the robbery of one bank a violation of Title 12 588B, Sections 588B(A) and 588B(B) please see Indictment and Sentence.

Petitioner has had his legal twenty-five (25) year sentence served since February 22, 1954.

Res judicata does not apply to petitioner,

Kerr v. Squire,

151 F2D 308 "9 Cir."

Since May 6, 1942, the time of the vacations of sentences on counts one (1) and two (2) See

Wells v. United States,

"5 Cir." 124 F2D 334.

All District Courts and Courts of Appeals "except Fifth Circuit" have rendered new interpretations of the ruling in *Holiday v. Johnston*, 313 U. S. 342 61 Sct. 1015; which have resulted in a clarification of that ruling and of the bank robbery act, and petitioner believes and contends that he is now entitled to have his discharge, as he is in double jeopardy.

Petitioner believes and contends:

That the bank robbery act does not provide for separate offenses but for different degrees of the one offense, and that only one sentence may be imposed;

Holiday v. Johnston,

Supra;

Hewitt v. United States,

"8 Cir." 110 F2D 1;

Sinunov v. United States,

"6 Cir." 162 F2D 314;

McDonald v. Johnston,

"9 Cir." 149 F2D 768;

Dimenza v. Johnston,

"9 Cir." 130 F2D 465;

Holbrook v. United States,

"8 Cir." 136 F2D 649.

That count three charges the aggravated degree of the offense charged in count four and that the twenty-five (25) year sentence thereon is the only valid sentence;

That the offense charged in count four is a lesser

included offense, and that the twenty (20) year sentence thereon is excessive and void and should be vacated, because petitioner is being twice placed in jeopardy for the same offense, and is serving two sentences for the same offense, in violation of the Fifth Amendment of the Constitution.

“Prayer”

Petitioner respectfully prays the following:

1. That his honor grant me permission to file this petition in my hand writing;

2. That this Honorable Court enter an order commanding the said E. B. Swope, Warden, appear before this Court, “With petitioner,” and show cause, if any he has, why a writ of habeas corpus should not be issued and granted, and petitioner discharged from custody, as prayed for;

3. That this Honorable Court upon the filing of the return to said order to show cause, grant the petitioner permission to traverse it orally;

4. And after a summary of the proceedings therein, discharge petitioner from further restraint of his liberty as law and justice requires.

Respectfully submitted,

/s/ SELVIE WINFIELD WELLS,
Petitioner.

United States Penitentiary, Alcatraz, California,
April 7, 1954.

Duly verified.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that Edwin B. Swope, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 21st day of April, 1954, at the hour of 9:30 o'clock a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: April 8, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now Edwin B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through Lloyd H. Burke, United States Attorney for the Northern District of California, and Richard H. Foster, Assistant United States Attorney, and moves to dismiss the petition for habeas corpus herein for the following reasons:

(1) The issues raised by petitioner in the present action have been previously adjudicated by the Court of Appeals for the Fifth Circuit in the case of *Wells v. United States*, 124 F. 2d 335; hence, petitioner's present claim is *res adjudicada*;

(2) Petitioner has heretofore petitioned for a writ of habeas corpus on the same grounds as the petition herein in the case of *Wells v. Swope*, No. 31272, in the United States District Court for the Northern District of California, Southern Division. United States District Judge Louis E. Goodman dismissed the petition on the grounds that under Title 28, Section 2255, United States Code, as interpreted in the cases of *Winhoven v. Swope* (9th Cir.), 195 F. 2d 181, and *Jones v. Squier* (9th Cir.), 185 F. 2d 179, this Court was without jurisdiction to entertain a petition for a writ of habeas corpus;

(3) The petition fails to state a claim upon which relief can be granted;

(4) Attached hereto and made a part hereof are

copies of the judgment and commitment of the United States District Court for the Western District of Texas and the modified judgment and commitment of that court.

Dated: April 29, 1954.

LLOYD H. BURKE,
United States Attorney,

By
RICHARD H. FOSTER,
Assistant U. S. Attorney,
Attorney for Respondent.

United States District Court, Western District of
Texas, San Antonio Division

No. 11848—Cr.

THE UNITED STATES,

vs.

SELVIE WINFIELD WELLS.

JUDGMENT AND COMMITMENT

Wednesday, April 13th, A.D. 1938

This day this cause coming on to be heard, came the United States by their District Attorney, and came also the defendant, Selvie Winfield Wells, in his own proper person, and thereupon the said defendant was arraigned at the bar of the court, when both parties announced ready for trial; and a jury having been waived, and the indictment having been

read to the defendant, he, for himself, in open court, voluntarily entered his plea of guilty to the charges contained therein.

Wherefore, it is considered and adjudged by the Court that the defendant, Selvie Winfield Wells, is guilty, as confessed in his said plea of guilty, of the offense of having, on or about the 5th day of March, 1938, in Caldwell County, Texas, within the Austin Division of the Western District of Texas, by putting Addie Walker in fear, feloniously taken from the presence of the said Addie Walker Two Thousand Four Hundred Eighty-two Dollars and Twenty-five Cents (\$2,482.25) in money, which said money then and there belonged to the Citizens State Bank, Luling, Texas, and which said bank was then and there a banking association incorporated under the laws of the State of Texas, and was then and there an insured bank within the meaning of the provisions of Section 2 64, Title 12, United States Code, relating to the Federal Deposit Insurance Corporation, as charged in the first count of the indictment; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, in committing the offense described in the first count of the indictment herein, assaulted Addie Walker, as charged in the second count; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, in committing the offense described in the first count of the indictment herein, put the life of Addie Walker

in jeopardy by the use of a dangerous weapon, to wit, a pistol, as charged in the third count; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, entered the bank described in the first count of the indictment herein, with intent to commit therein a felony, to wit, robbery, as charged in the fourth count thereof.

And said defendant being asked by the Court if he had anything to say why the sentence of the law should not be pronounced against him, and he answering nothing in bar thereof:

It is the order and sentence of the Court, that the defendant, Selvie Winfield Wells, for the said offense by him committed and charged in the first count of the indictment, be imprisoned for the period of Twenty (20) Years in a United States Penitentiary to be designated by the Attorney General of the United States; and for the said offense by him committed and charged in the second count thereof, be imprisoned for the period of Twenty-five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the second count of the indictment to begin at the expiration of that imposed under the first count thereof; and for the said offense by him committed and charged in the third count thereof, be imprisoned for the period of Twenty-five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the

third count of the indictment to begin at the expiration of that imposed under the second count thereof; and for the said offense by him committed and charged in the fourth count thereof, be imprisoned for the period of Twenty (20) Years, in a United States Penitentiary to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the fourth count of the indictment, to begin at the expiration of that imposed under the third count thereof, and that said defendant be, and he is hereby, committed to the custody of said Attorney General or his authorized representative.

It is further ordered by the Court that said defendant be temporarily held in custody by the United States Marshal for the Western District of Texas, pending definite designation of the place of confinement for service of the sentence herein imposed, a certified copy of this order to be authority to said Marshal for his action in the premises.

Ordered in open Court at San Antonio, Texas, this the 13th day of April, A.D. 1938.

/s/ ROBERT J. McMILLAN,
United States District Judge.

Approved:

W. R. SMITH, JR.,
United States Attorney,

By H. W. MOURSUND,
Assistant U. S. Attorney.

Entered: Minute Volume D-1, page

A true copy of the original, I certify.

MAXEY HART,

Clerk,

By J. E. DAVIS,

Deputy.

(Copied from reverse side of commitment)

This is to certify that the within named Selvie Winfield Wells has been in custody and confined in the Bexar County Jail since the 13th day of April, 1938, and is entitled to such credit.

GUY McNAMARA,

United States Marshal,

By J. D. McNIEL,

Deputy.

A true record.

By /s/ C. W. SUNDSTROM,

Record Clerk, U.S.P.,

Alcatraz, California.

Feb. 25, 1952.

United States District Court, Western District of
Texas, San Antonio Division
No. 11848—Cr.

THE UNITED STATES

vs.

SELVIE WINFIELD WELLS.

MODIFIED JUDGMENT AND COMMITMENT

Whereas, on Wednesday, April 13th, A.D. 1938, the following judgment and sentence was entered in the above-styled and numbered cause, to wit:

“This day this cause coming on to be heard, came the United States by their District Attorney, and came also the defendant, Selvie Winfield Wells, in his own proper person, and thereupon the said defendant was arraigned at the bar of the court, when both parties announced ready for trial; and a jury having been waived, and the indictment having been read to the defendant, he, for himself, in open court, voluntarily entered his plea of guilty to the charges contained therein.”

“Wherefore, it is considered and adjudged by the Court that the defendant, Selvie Winfield Wells, is guilty, as confessed in his said plea of guilty, of the offense of having, on or about the 5th day of March, 1938, in Caldwell County, Texas, within the Austin Division of the Western District of Texas, by putting Addie Walker in fear, feloniously taken from the presence of the said Addie Walker Two Thousand Four Hundred Eighty-two Dollars and Twenty-five Cents (\$2,482.25) in money, which said money then and there belonged to the Citizens State Bank, Luling, Texas, and which said bank was then and there a banking association incorporated under the laws of the State of Texas, and was then and there an insured bank within the meaning of the provisions of Section 264, Title 12, United States Code, relating to the Federal Deposit Insurance Corporation, as charged in the first count of the indictment; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, in committing the offense described in the first count

of the indictment herein, assaulted Addie Walker, as charged in the second count; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, in committing the offense described in the first count of the indictment herein, put the life of Addie Walker in jeopardy by the use of a dangerous weapon, to wit, a pistol, as charged in the third count; and

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, entered the bank described in the first count of the indictment herein, with intent to commit therein a felony, to wit, robbery, as charged in the fourth count thereof.”

“And said defendant being asked by the Court if he had anything to say why the sentence of the law should not be pronounced against him, and he answering nothing in bar thereof:

It is the order and sentence of the Court that the defendant, Selvie Winfield Wells, for the said offense by him committed and charged in the first count of the indictment, be imprisoned for the period of Twenty (20) Years in a United States Penitentiary to be designated by the Attorney General of the United States; and for the said offense by him committed and charged in the second count thereof, be imprisoned for the period of Twenty-five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the second count of the indictment to begin at the expiration of that imposed under the first count

thereof; and for the said offense by him committed and charged in the third count thereof, be imprisoned for the period of Twenty-five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the third count of the indictment to begin at the expiration of that imposed under the second count thereof; and for the said offense by him committed and charged in the fourth count thereof, be imprisoned for the period of Twenty (20) Years, in a United States Penitentiary to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the fourth count of the indictment, to begin at the expiration of that imposed under the third count thereof, and that said defendant be, and he is hereby, committed to the custody of said Attorney General or his authorized representative."

"It is further ordered by the Court that said defendant be temporarily held in custody by the United States Marshal for the Western District of Texas, pending definite designation of the place of confinement for service of the sentence herein imposed, a certified copy of this order to be authority to said Marshal for his action in the premises."

"Ordered in open Court at San Antonio, Texas, this the 13th day of April, A.D. 1938.

/s/ ROBERT J. McMILLAN,
United States District Judge.

Approved:

W. R. SMITH, JR.,
United States Attorney,

By H. W. MOURSUND,
Assistant U. S. Attorney."

And, Whereas, thereafter, on August 4, A.D. 1941, the defendant Selvie Winfield Wells, filed in this court his petition for correction of judgment and sentence, and on August 20, A.D. 1941, said motion for correction of judgment and sentence was denied; and

Whereas, thereafter defendant perfected his appeal from the judgment of this Court denying his motion for correction of judgment and sentence to the United States Circuit Court of Appeals for the Fifth Circuit and filed his record therein; and

Whereas, during the November term, A.D. 1941, of said United States Circuit Court of Appeals for the Fifth Circuit, to wit, on December 16, A.D. 1941, said United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the trial court entered on April 13th, A.D. 1938, as to the sentences imposed under counts one and two of the indictment herein, and affirmed the sentences imposed by the Court under counts three and four of said indictment, and on said December 16th, A.D. 1941, in its mandate, ordered and adjudged as follows, to wit:

"It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is

hereby, affirmed insofar as it upheld the sentences imposed under counts three and four, and reversed as to the sentences imposed under counts one and two; and that this cause be, and it is hereby, remanded to the said District Court for the correction of the mittimus, and for such further proceedings as are not inconsistent with the opinion of this Court.”

Therefore, in accordance with the mandate of the said United States Circuit Court of Appeals for the Fifth Circuit, it is now Ordered and Adjudged by the Court that the mittimus in this cause heretofore issued on Wednesday, April 13th, A.D. 1938, be, and the same is hereby corrected as follows:

The sentences imposed herein under Counts one and two of the indictment are hereby set aside, annulled and held for naught;

and that the sentence imposed herein under Count three of the indictment be, and the same is hereby, corrected to read as follows:

“It is the order and sentence of the Court that the defendant, Selvie Winfield Wells, for the said offense by him committed and charged in the third count of the indictment, be imprisoned for the period of Twenty-five (25) years in a United States Penitentiary, to be designated by the Attorney General of the United States”;

and that the sentence imposed herein under Count four of the indictment remain in full force and effect as originally imposed.

It is further ordered that the Clerk of this Court provide the Warden of the United States Penitentiary at Alcatraz, California, with a certified copy of this order for his information and observance.

Ordered in open Court at San Antonio, Texas, this 6th day of May, A.D. 1942.

/s/ W. A. KEELING,
United States District Judge.

Approved:

BEN F. FOSTER,
United States Attorney,

By J. M. BURNETT,
Assistant U. S. Attorney.

A true copy of the original, I certify.

MAXEY HART,
Clerk,

By J. E. DAVIS,
Deputy.

A True Record.

By /s/ C. W. SUNDSTROM,
Record Clerk, U. S. P.,
Alcatraz, California.

February 25, 1952.

[Endorsed]: Filed April 29, 1954.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 33471

SELVIE W. WELLS,

Petitioner,

vs.

EDWIN B. SWOPE, Warden, United States Peni-
tentiary,

Respondent.

MEMORANDUM OPINION AND ORDER

Petitioner, confined at Alcatraz Penitentiary, seeks to obtain his release. In his petition for writ of habeas corpus petitioner alleges that he has completed service of a twenty-five year sentence imposed for bank robbery by the District Court in Texas. A consecutive sentence of twenty years remains unserved. Petitioner attacks such sentence on the ground that it is void and constitutes double jeopardy.

The procedural record discloses that petitioner received an initial sentence of ninety years based on four counts arising out of violation of 12 U.S.C.A. 588(b), (a) and (b).¹ On a motion filed

¹“Robbery of bank; * * *

“(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or

for correction of sentence in 1941 petitioner succeeded in having the trial court, upon remand, eliminate the first two counts, with sentences totaling forty-five years. *Wells vs. United States*, 124 F. 2d 334.

More recently he sought relief in the District Court for the Northern District of California through a writ of habeas corpus, contending that the trial court had jurisdiction and authority to sentence him under one count only, such count including the lesser offenses described in the first

whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

“(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than \$1,000 nor more than \$10,000 or imprisoned not less than five years nor more than twenty-five years, or both.”

three counts. Honorable Louis Goodman dismissed the petition on the ground that Wells had failed to present the matter to the sentencing court as required by 28 U.S.C.A. 2255.

In accordance with the directions contained in the order made by this court, petitioner again sought relief in the trial court of Texas. He was unsuccessful in obtaining a further correction of sentence. On appeal, the Fifth Circuit sustained the trial court's ruling as the exercise of the trial court's discretion. *Wells v. United States*, 210 F. 2d 112.

Petitioner alleges that the additional sentence of twenty years for "entering the bank with the intention to commit a felony therein" is void and invalid, as it necessarily merged with the other sentence which has now been served, covering the offense in the aggravated form. (588(b), 12 U.S.C.A.)

The motion to dismiss filed by the respondent asserts that this Court is without jurisdiction to entertain the petition. *Winhoven v. Swope*, 195 F. 2d 181. It is conceded that petitioner has served twenty-five years of his sentence.

Under the law of the Ninth Circuit (*Stevenson v. Johnston*, 72 F. Supp. 627, affirmed 163 F. 2d 750), petitioner has completed service of the only valid sentence which the Court might impose for the act of armed robbery for which he has served his twenty-five year sentence. Cf. *Holiday v. Johnston*, 313 U.S. 342. The problem before this Court in-

volves the contemplation of a judgment and sentence which is void.

It is not necessary to go beyond the judgment and commitment² to determine that the additional

²U. S. v. Wells, No. 11848, U. S. Dist. Ct., Western District of Texas, San Antonio Division; April 13, 1938.

“It is the order and sentence of the Court, that the defendant, Selvie Windfield Wells, for the said offense by him committed and charged in the first count of the indictment, be imprisoned for the period of Twenty (20) Years in a United States Penitentiary to be designated by the Attorney General of the United States; and for the said offense by him committed and charged in the second count thereof, be imprisoned for the period of Twenty-Five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the second count of the indictment to begin at the expiration of that imposed under the first count thereof; and for the said offense by him committed and charged in the third count thereof, be imprisoned for the period of Twenty-Five (25) Years in a United States Penitentiary, to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the third count of the indictment to begin at the expiration of that imposed under the second count thereof; and for the said offense by him committed and charged in the fourth count thereof, be imprisoned for the period of Twenty (20) Years, in a United States Penitentiary to be designated by the Attorney General of the United States, said sentence of imprisonment imposed under the fourth count of the indictment, to begin at the expiration of that imposed under the third count thereof, and that said defendant be, and he is hereby, committed to the custody of said Attorney General or his authorized representative.”

sentence under which the petitioner is now serving at Alcatraz Penitentiary, is invalid; such fact is manifest from the record itself without the requirement of taking evidence.

Bound as I am by the law of this Circuit, the only question that now arises is whether this Court is foreclosed, under the circumstances present from declaring the sentence void and granting appropriate relief.

I cannot conceive that Section 2255, Title 28, U.S.C.A. has so far supplanted the traditional writ of habeas corpus as to preclude this Court from granting the relief prayed for, particularly when when it appears a miscarriage of justice will result.

If habeas corpus is not available to petitioner under the extreme circumstances of this case, then it is clear that procedural due process has not been, and cannot be, accorded to Wells. Procedural rigidity should not be permitted to supplant substantial justice. In *Brown v. Allen*, 344 U. S. 443, 512, Mr. Justice Frankfurter said, with reference to the writ of habeas corpus:

“The circumstances and conditions for bringing into action a legal remedy having such potentialities obviously cannot be defined with a particularity appropriate to legal remedies of much more limited scope. To attempt rigid rules would either give spuriously concrete form to wide-ranging purposes or betray the purposes by strangulating rigidities.”

Petitioner has taken the procedural steps required by 28 U.S.C.A., Section 2255, at the behest of this Court. His petition for relief proved to be unavailing. This, despite the fact that the sentence he is

now serving and which he challenged, is void. The decision of the sentencing court is manifestly erroneous. *Stevenson v. Johnston*, supra. Habeas corpus is the sole remedy remaining to petitioner for establishing his right to release.

I am privileged to note herein that Honorable Louis Goodman joins with me in declaring that the sentence under which petitioner Wells is now confined in Alcatraz Penitentiary is void.

This statement is made to the end that no inferences may be drawn from the prior ruling of Judge Goodman in this case.

The petitioner may have his relief as prayed. The judgment and sentence in question is declared to be, and the same is, void and invalid.

The writ of habeas corpus may issue.

Dated: June 4, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

I Concur:

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed June 4, 1954.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 33471

SELVIE W. WELLS,

Petitioner,

vs.

EDWIN B. SWOPE, Warden, United States Peni-
tentiary,

Respondent.

WRIT OF HABEAS CORPUS

This matter having come on for hearing before the Honorable George B. Harris, Judge of the above-entitled Court, Morris M. Grupp, Esq., appearing as Counsel for petitioner above named, and Lloyd H. Burke, Esq., United States Attorney, and Richard H. Foster, Esq., Assistant United States Attorney for the Northern District of California, appearing as Counsel for the Respondent, the Court having heretofore issued its Order to Show Cause, heard the said matter on the Respondent's Motion to Dismiss said Petition, considered the arguments and statements of Counsel and fully considered the matter, and the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the petitioner be discharged from custody of the Respondent forthwith.

Dated this 9th day of June, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.] *

NOTICE OF APPEAL

Notice is hereby given that the respondent E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through his attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, and Richard H. Foster, Assistant United States Attorney, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order, judgment and decree of the United States District Court for the Northern District of California issuing a writ of habeas corpus discharging Selvie W. Wells from the custody of respondent E. B. Swope made and entered on June 9, 1954.

Dated: June 9, 1954.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ RICHARD H. FOSTER,

Assistant U. S. Attorney,

Attorneys for Respondent.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk to the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they con-

stitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for writ of habeas corpus.

Order to show cause.

Motion to dismiss with documents attached.

Memorandum opinion and order.

Writ of habeas corpus.

Notice of appeal.

Designation of record on appeal.

Statement of points upon which appellant intends to rely.

Motion and Order for extension of time.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of August, 1954.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14,496. United States Court of Appeals for the Ninth Circuit. Edwin B. Swope, Warden, U. S. Penitentiary, Alcatraz, California, Appellant, vs. Selvie W. Wells, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 30, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit.

No. 14,496

EDWIN B. SWOPE, Warden, United States Peni-
tentiary, Alcatraz, California,

Appellant,

vs.

SELVIE W. WELLS,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through his attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, and Richard H. Foster, Assistant United States Attorney, and states as the points upon which he intends to rely on appeal before the Court of Appeals for the Ninth Circuit as follows:

1. That the District Court erred in entertaining an application for a writ of habeas corpus after the denial of a motion to correct appellee's sentence by the sentencing court, the United States District Court for the Western District of Texas, under Section 2255 of Title 28 United States Code, and the decision of the Court of Appeals for the Fifth Circuit affirming that denial in *Wells v. United States*, 210 F. 2d 112.

2. That the District Court erred in holding that appellee's sentence of twenty years for "entering a bank with intent to commit a felony therein," merged with appellee's twenty-five year sentence for bank robbery.

Dated: September 2, 1954.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ RICHARD H. FOSTER,
Assistant U. S. Attorney,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 2, 1954.